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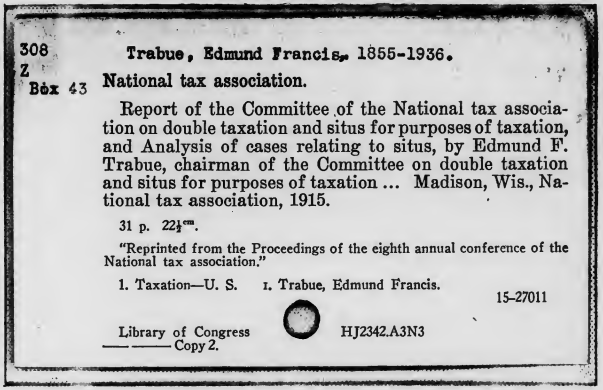
National Tax Association

Report of the Committee of the National Tax...

Madison, Wis.

1915



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REPORT OF THE COMMITTEE OF THE
NATIONAL TAX ASSOCIATION

ON

DOUBLE TAXATION AND SITUS FOR PURPOSES OF TAXATION

AND

ANALYSIS OF CASES RELATING TO SITUS

BY

EDMUND F. TRABUE
Chairman of the Committee on Double Taxation and
Situs for Purposes of Taxation

REPRINTED FROM THE PROCEEDINGS OF THE EIGHTH ANNUAL
CONFERENCE OF THE NATIONAL TAX ASSOCIATION

MADISON, WIS.
NATIONAL TAX ASSOCIATION
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REPORT OF COMMITTEE ON DOUBLE TAXATION AND SITUS FOR PURPOSES OF TAXATION

Your committee on "Double Taxation and Situs for Purposes of Taxation," begs leave to report, in part, and to suggest that the importance of the topic assigned to it is so great, and calls for so much detailed study, that the committee may well be continued for another year, under instructions to report at the next National Tax Conference.

Of the five members of your committee, two have been unable to participate in its work and therefore they, Messrs. Walker and Smith, are not to be considered as subscribing to this report. The Chairman, Mr. Trabue, who is unable to be present, has prepared an analysis of decisions relating to situs. This analysis is annexed hereto in the belief that it indicates both the present confused situation, and also the difficult problem which is to be studied.

Much of the confusion existing in the field of taxation in this country arises from the existence of our many separate state governments, each with its own code of tax laws. Jurisdiction is ill-defined. Nearly every state is anxious to bring the greatest possible number of subjects, and the greatest possible amount of property under its taxing jurisdiction. So great has been the pressure in this direction, that legislatures have too frequently neglected to observe the ordinary rules of equity and fair play, and the courts have too often given judicial sanction to methods of taxation which are not economically justified under our present system of industrial and fiscal organization.

A previous National Tax Conference has heretofore stated its conviction that the general property tax in this country has proved ineffective, and it has suggested some partial remedies for this failure. Much remains to be done, however, in the promulgation of a constructive program, and there is need of well considered findings, as to the principles and considera-

tions which should prevail in the establishment or modification of tax systems in the several states. Your committee is convinced that it is possible to set forth a program which shall be sound economically, yet which shall be more than an academic discussion the teachings of which cannot be applied to the actually existing conditions.

In the numerous efforts for tax reform which have been made in the American states during the last twenty or twenty-five years, at least four tendencies can be identified. Namely:

1. To centralize the assessing authority. This has resulted in the establishment of state tax commissions, county boards of review, etc.

2. To establish special taxes for different classes of property or activity, thus abolishing or modifying in some respects the unsatisfactory general property tax.

3. To separate the sources of state and local revenue, and provide home rule or local option in taxation.

4. To secure the establishment, in whole or in part, of the single tax.

As to the profit or loss which has resulted from these various tendencies, we are not now concerned. Our problem is to ascertain and set forth the controlling principles as to situs of property for purposes of taxation, principles which should be adhered to by the several states under whatever form their tax systems exist, to the end that interstate comity may be observed, and equitable and practicable taxation may result. Your committee has no intention of undertaking to maintain that forms of taxation can be uniform in the several states. It is too clear to need proof that each state will develop its own forms of taxation, and that within limits each ought so to do. It need not be concluded that thereby sound economic principles must or will be disregarded.

Concerning the situs of real estate for purposes of taxation, there need be no long discussion. By legislative enactment and judicial interpretation, the situs of real estate is established at the place of location, and the taxation of real estate, as such, is imposed there, and there alone.

Likewise, no consideration need be given by your committee to questions of intrastate situs, to coin a phrase. Such ques-

tions are purely local. They have no direct connection with interstate relationships. Undoubtedly, this conference could well afford to consider the matter of intrastate situs; but your committee conceives its task to be to treat its topic merely in relation to the question of situs in its interstate bearings.

Therefore we find that, as thus defined, the problem before us is limited to:

1. Situs in the taxation of inheritances.

2. The situs of personal property for purposes of property taxation.

Inheritance Taxation:

A previous National Tax Conference has heretofore taken its stand with regard to the taxation of inheritances, and it has stated the considerations, which, in its judgment ought to be controlling. In the main, we are of the opinion that the stand thus taken is correct. In only one respect do we find that it ought to be modified. It is to be constantly borne in mind that the taxation of inheritances is not the taxation of property. It has been repeatedly decided by the courts that the taxation of inheritances is not the taxation of the property itself. The imposition of inheritance taxes finds its justification in the recognized power of the sovereign, to control or limit the devolution of property. It follows that the correct principle underlying the taxation of inheritances is expressed by saying that a given state should levy its inheritance tax only with reference to such property as devolves in accordance with its laws.

If the procedure indicated by this expression shall be adhered to by the American states, most questions of situs with relation to inheritance taxation will have been settled, since we find that there is practically no uncertainty as to the jurisdiction which controls the devolution of property. Real estate devolves in accordance with the laws of the jurisdiction in which it is situated. Personal property devolves in accordance with the laws of the domicile of the owner. Taxation of inheritances should be levied accordingly. We find it necessary to suggest, therefore, that the position heretofore taken may well be modified in this respect. Even the tangible personal

property of a deceased person should be taxed by no jurisdiction other than that of his late domicile. We know full well that there are members of this conference who find it impossible to agree to this position as the underlying and controlling factor in inheritance taxation. We offer no challenge to the conscientiousness of those who differ from our contentions. We are, nevertheless, convinced that procedure by the American states as herein indicated, offers the only possible method for the avoidance of multiple taxation of inheritances, and for the establishment of an administrative system which shall be both equitable and practicable. The adoption of any other procedure presents administrative difficulties for which your committee is not able to find any solution.

We feel constrained to suggest that pending the adoption of these principles by the several states, each should lose no time in so modifying its present procedure as to become consistent with itself. If, and in proportion as a state taxes a non-resident decedent, it should exempt a resident decedent having property of similar character and location, and *vice versa*. No one here, we submit, will defend a practice which undertakes to appropriate both ends and the middle.

Situs of Personal Property:

Personal property divides into two main classes, usually referred to as "tangible" and intangible." Tangible personal property is either permanently located, or it is to a greater or less extent itinerant. Concerning the taxable situs of permanently located tangible property, there is, or can be, but little uncertainty, or difference of opinion. The place of permanent location determines and is the situs. In this class there is included stocks of merchandise, live stock, household furniture, etc. There are at least two classes of tangible personal property which are not permanently located, the situs of which, therefore, is in dispute or is undetermined. We refer to railroad rolling stock, and ships and vessels. Interstate comity, in reference to the taxation of these two classes of property, can be accomplished by following the decisions already rendered. According to these decisions rolling stock acquires a taxable situs in the jurisdictions traversed by the railway of

the owning corporation, and the values of the rolling stock must be apportioned to the several jurisdictions covered by the operations of the railway, on some equitable basis of division, presumably rail mileage, or track, or car mileage. Such an apportionment of value is possible without administrative difficulty even though there are several systems of taxation other than ad valorem. The apportionment of gross earnings or of aggregate values determined by security values among the several states covered by the operations of the railway is, in general, proportional to the value of the rolling stock in the separate jurisdictions which it traverses.

Ships and vessels are more wandering in nature than are railroad cars, and the problem of their situs is therefore more difficult. There is also less judicial interpretation with reference to them, and your committee makes, at this time, no other suggestion than that ships and vessels if plying regularly in the waters of a given state, there acquire a taxable situs; but that ships and vessels which go back and forth from state to state, or to foreign points can acquire no taxable situs other than the domicile of their owner, and that in such domicile taxation of them must be applied.

So-called intangible personal property usually exists in one of the following forms:

(a) Promissory notes and commercial paper.
(b) Real estate mortgages.
(c) Stock of moneyed corporations other than banks.
(d) Stock of banks.
(e) Bonds of corporations.
(f) Franchises.
(g) Bank deposits and cash.
(h) Bonds issued by government or a political sub-division thereof.

It would be idle to deny that the above are classes of property. Irrespective of the character and of the taxation of the other classes of property to which the above are related or upon which they depend, they themselves, with certain exceptions below noted, afford a tax-paying ability, and therefore a tax-paying duty.

Bonds issued by government or a subdivision thereof, the proceeds of which are used for some public purpose, ought to have no relation to taxation in any form. As instruments of government, they and their holders are to be exempt. Taxable situs of such bonds, therefore, becomes a matter of no importance.

Franchises do not exist apart from the property to which they relate, and so far as a franchise has a taxable value its situs is in the field of operation of the corporation to which it has been assigned. Your committee is convinced that attempts to value and tax a franchise as a separate thing have caused confusion and inequity in many cases; that only by considering a franchise as a part of the whole property of the owning corporation or as a factor in the determination of its value can situs be determined; that when thus considered the problem of the situs of a franchise solves itself, since its value will automatically be apportioned to the several taxing jurisdictions in accordance with the basis of apportionment in use for the property or the values to which the franchise attaches. Moreover, with the increasing regulation of rates, franchise values tend to become a diminishing quantity. We may sometime reach that happy day when the terms "franchise" and franchise values" will have been eliminated from the dictionary of taxation, and when taxing officials, legislatures and courts may give their attention to things which are capable of more exact definition and of human understanding.

The injunctions of the Congress relating to the taxation of national banks have established the place of location of the bank as the situs for its taxation. States generally have followed this precept in the taxation of other banks. Usually banks are taxed in terms of the capital stock. Such taxation, while technically the taxation of the personal property of the share owner, is nevertheless in essence the taxation of the corporation. In this partial report we make no further comment than to state the bold proposition that situs for the taxation of bank stock should be the location of the bank, and further (which we know will be challenged) that bank shares are to be distinguished from other securities and from credits not only

with relation to their situs but also with relation to the amount of taxation which they shall bear.

From our list of the classes, into one of which intangibles fall, there remain for further consideration:

Promissory notes and commercial paper.

Real estate mortgages.

Stock of moneyed corporations.

Bonds of corporations.

Bank deposits and cash.

The situs of these classes of property has been the subject of almost unlimited legislation and litigation. In but few jurisdictions has the conception been evolved and the practice established that these classes of property, as such, have no taxable situs. Here again in this tentative or partial report we content ourselves with making the simple statement that in working for the abolition of excessive multiple taxation and for the establishment of a reasonable and practicable interstate comity, we must abandon all attempts to ascribe to the above classes of personal property an independent situs in which they are to bear such taxation as falls upon other classes of property.

Nevertheless, it is clear to your committee that the possession of property of the above mentioned classes indicates a tax-paying ability and duty in the owner, and that the domicile of the owner thus is the place in which a tax may be levied against the owner with reference to or because of his ownings of property of these classes. Your committee is convinced, moreover, that such taxation as is to be imposed upon the owner of these intangibles, in order to be equitable and collectable, must bear a reasonable relation to the income derived from the property. The commercial and industrial organization of the world is built up on the assumption that a tax at the usual rates prevailing in this country cannot be assessed upon *and collected from* credit forms of property. For this reason, credits issue and circulate upon about the same basis of yield in non-taxing, and in taxing jurisdictions. Neither a single American legislature nor all of them, nor even this conference can enact or resolve themselves away from this fact. This fact is more potent than tax legislation and tax theorizing.

Both of the latter must reasonably conform themselves to it. The taxation to be imposed upon the owner of personal property of the classes which we are now considering as a personal tax at his domicile should, as we have already said, bear a reasonable relation to the income produced by the property. Such tax may be assessed in terms of income or at a low flat rate which shall in fact absorb a reasonable portion of the income. A third way we are unable to discover. As to which of the two shall be adopted in any state, this conference has no concern, and your committee has no opinion.

The above outline is submitted in the full appreciation that it is but an outline; that in many details it is silent; that in some respects it violates tenets of taxation which have obtained for generations; that in parts it is bound to be challenged.

In broad terms we may say that we aim at a formula, the controlling factors in which shall be:

First: Inheritance taxes must be levied by a given state only with reference to such property as devolves in accordance with its laws.

Second: Real estate and tangibles can have but one situs, namely, the place or places of location.

Third: Intangibles as such have no taxable situs but should subject their owner at his domicile to taxation reasonably proportional to the income he derives.

We submit that if the American states shall conform to this conception of situs, much so-called and objectionable double taxation will disappear. We are unable to suggest any other plan, the adoption of which will so simplify our interstate tax relations and so equitably place tax burdens upon property and persons. Too much meaningless discussion has already taken place relating to the iniquities of double taxation. Not all so-called double taxation ought to be abolished. The effort must be to have all taxation reasonable. If it shall become this, there will be none to fear the word "double." Considerable progress has already been made by various states in the general direction indicated by these findings. It appears reasonable to expect that a continued development in the same direction is to follow. Of course, complete realization is not to be expected at once if at all, but your committee believes

that a statement of the principles to be striven for will promote none but good results and will perhaps assist some states to depart at once from some of their indefensible practices.

EDMUND F. TRABUE, *Chairman,*
CHAS. A. ANDREWS.
JOHN E. BRINDLEY.

Note.—Mr. Trabue is not in exact accord with all the doctrines of the report, but is in accord with almost all, and concurs in its recommendations. His points of difference are principally shown in the analysis of authorities appended.

ANALYSIS OF CASES RELATING TO SITUS

EDMUND F. TRABUE

Chairman Committee on Double Taxation and Situs for Purposes of Taxation, Louisville, Kentucky

The question of *situs* is of great difficulty, both because of inherent perplexity and of general misconception of the principles involved. It becomes then necessary to consider as well what is practicable as what is sound theoretically. Also, *situs* presents a question of constitutional, or private international, law.

A state can tax only that which is theoretically within its territory; Lou. etc., *Ferry Co. vs. Kentucky,* 188 U. S. 385; *Del. L. & W. R. R. vs. Penn.,* 198 U. S. 341; *U. R. Trans. Co. vs. Kentucky,* 199 U. S. 194. In the Ferry case, the question was declared one of Due Process, but in the Transit Co. case, Holmes, J., (199 U. S. 211) said, although concurring in the result, "but I hardly understand how it (result) can be deduced from the 14th amendment." Probably the question is one of private international law rather than one of due process, but the result is the same. Because of the constitutional (or private international) question, it would seem to follow that property can have but one *situs,* and that the domicile of those interested therein cannot be rightfully regarded as controlling on the question of situs. Likewise, inasmuch as taxes are payable out of income, the situs of the property and not the domicile of the owner ought to fix the situs for taxation.

Property, as such, should be taxed only once. If taxable twice, it might with equal propriety be taxed an unlimited number of times. All manifold taxation is consequently destructive of equality, and without equality taxation becomes arbitrary exaction or spoliation.

It has been long agreed that real estate is taxable solely in the place of location; and it is now settled that tangible per-

sonal property is so taxable. The remaining difficulty is with reference to intangible personalty.

(a) If the principal opinion in *Wheeler vs. Sohmer,* 233 U. S. 434, 439, were supported by a majority of the judges, negotiable securities, such as bonds, bills of exchange and the like, would be taxable where located, as are lands and tangible personalty, for the principal opinion declares, (p.439), "But . . . bills and notes, whatever they may be called, come very near to identification with the contract that they embody. An endorsement of the paper carries the contract to the endorser. An endorsement in blank passes the debt from hand to hand, so that whoever has the paper has the debt. . . . It is not primitive tradition alone that gives their peculiarities to bonds, but a tradition laid hold of, modified, and adapted to the convenience and understanding of business men. The same convenience and understanding apply to bills and notes, as no one would doubt in the case of bank notes, which technically do not differ from others."

It would seem to follow logically from the enunciation just quoted that the *situs* of all securities passing by delivery, or delivery after endorsement, would be the place of their actual location and no longer that of the domicile of their owner; but such opinion is simply the language of Mr. Justice Holmes, concurred in by only three of this colleagues, and is repudiated by five justices of the court.

It is, therefore, probably still open to legislation to locate the *situs* of such securities at the domicile of the owner, or at the place where the securities originate when they are the product of a definitely located business.

See, also, *Buck vs. Beach,* 206 U. S. 392, and the elaborate concurring opinion of Mr. Justice McKenna, in *Wheeler vs. Sohmer,* (233 U. S. 441), and cases there reviewed.

(c) Little difficulty exists over *situs* as to credits, open accounts, bills receivable, etc., not having already taken the form of obligations deliverable, or deliverable after endorsement. Assuming these to be property, they would seem to be the property of the owner, and having no substance which could give an actual location, but being unsubstantial or ideal, they have for convenience or necessity taken the owner's domicile

as a *situs*. Such *situs*, however, appears to rest upon grounds less substantial than those locating the *situs* of tangible property, because they are not protected by government, i. e., not by government police. True they are assured by judicial proceedings, but so are bonds and notes negotiable. Having, then, no actual location but one based upon construction or fiction, their *situs* may yield to conditions. Accordingly, although accounts or credits would have their *situs*, generally, at the owner's domicile they might obtain a *situs* accruing from an established business; *N. O. vs. Stempel*, 175 U. S. 309; *Bristol vs. Washington Co.*, 177 U. S. 133; *Board vs. Comptoir etc. Co.*, 191 U. S. 388; *Met. L. I. Co. vs. N. O.*, 205 U. S. 395. It would therefore seem to follow that, where strictly intangible or ideal property gains a *situs* distinct and different from the place of the owner's domicile, it cannot be taxed elsewhere than in such *situs*, and that to tax it elsewhere offends the constitution. In *Com. vs. West India etc. Co.*, 138 Ky. 828, (129 S. W. 301), the owner's domicile was Kentucky, but the business out of which the credits grew was transacted in Cuba and Porto Rico. Its money was earned and left there, and its accounts due and payable there. The county court (the initial assessor) held the *accounts* taxable, but the *cash* non-taxable, upon appeal to the circuit court both were held non-taxable, which was affirmed. The question determined was the unconstitutionality of Sec. 4020, Ky. St., taxing the personal estate of Kentucky corporations, *whether in or out of the state*, including intangible property. The court said that (p. 829) "if the statute is constitutional, the property is taxable here," and cited the U. R. T. Case, 199 U. S. 194, to prove the statute unconstitutional.

The court, *arguendo*, (p. 830) cited *Com. vs. Dun & Co.*, 126 Ky. 108; 102 S. W. 859; 10 L. R. A., N. S., 920; as holding that money and accounts accumulated from business transacted in Kentucky were taxable there although the owners were non-residents, saying that such property was not temporarily in the state, but established there, and that "its business received the same protection as the business of the citizens under the laws of the state, and should be compelled to share equally the burden. The obligation to pay taxes for the support of the

government arises from the fact that it is under the protection of the government." Again, the court quoted from *Higgins vs. Com.*, 126 Ky. 211; 103 S. W. 306, "Where notes had been held taxable, although belonging to a non-resident because in the hands of a resident fiduciary for investment and reinvestment," (138 Ky. 831), "and it is generally recognized that tangible personal property has an actual *situs* at the place where it is located without respect to the domicile of the owner, whereas the *situs* of intangible personal property for purposes of taxation depends altogether on legislative enactment, or judicial construction. . . . For many purposes the domicile of the owner is deemed the *situs* of his personal property, but this is only a fiction from motives of convenience, and is not of universal application, but yields to the actual *situs* of the property when justice requires that it should, and is not allowed to be a controlling feature in matters of taxation." The court concluded (p. 834), "If it (the intangible property) could be taxed there (Cuba and Porto Rico) and elsewhere, it would be twice taxed. It cannot be taxed here unless within the jurisdiction of the state under the repeated decisions of the United States Supreme Court. No practical distinction can be drawn between the money of the company in its office in Cuba or that deposited in a bank there, or that due on its books for its product which has been sold and not paid for. It is all employed in the business in Cuba or Porto Rico. It has its *situs* there. It has no *situs* in Kentucky.

Note that the statute under review in the Kentucky cases (Sec. 4020) expressly provided for taxing the property in question; in the West India case it was held unconstitutional because the *situs* was determined not to be in Kentucky, and the Court's decision was predicated upon its construction of the cases decided by the United States Supreme Court. *Situs* is thus made by the court a question of constitutional law. Also, the decision that the intangible property of the corporation cannot be taxed in Kentucky, the domicile of the owner, demonstrates that it can be taxed only where the business is carried on and the property has accrued, for, if it could be taxed elsewhere, it would certainly be taxable at the owner's domicile, i. e., in Kentucky. This decision therefore implies

the negation of the existence of more than one *situs*. Consequently, if it be sound upon pronciple, no legislation can constitutionally create another *situs* nor tax property elsewhere than at its legal situs.

The principle of the decision seems to us sound, but it has not always been adhered to in the decisions of the courts. This would appear in considering the taxation against the stockholder of capital stock of corporations.

In the later case of *Hillman L. & L. Co. vs. Com.*, 148 Ky. 331, S. W., the land company transacted a losing business, and its money sent from its home office in Missouri to defray expenses in Kentucky was held non-taxable in Kentucky, although moneys collected there had been sent to Missouri, it being ruled that the money sent for expenses was temporarily in Kentucky, and not a part of the profits of the business. The court carefully excluded the inference that the case would have been similarly decided had the money in question been a part of the profits of the business; and in reaching its decision the court reviewed and reaffirmed its previous decisions, and expressed approval of the supreme court cases hereinbefore mentioned, and of *Liv. & Lon. etc. Co. vs. Board,* 221 U. S. 346.

In *Com. vs. Prudential Life Ins. Co.*, 149 Ky. 380, 149 S. W. 836, the proceeding was by a back tax collector to tax cash on hand and cash on deposit. The defendant was a foreign corporation. The statute provided for taxing all personal property within the state whether owned by citizens or non-residents. It was held that premiums collected in Kentucky, and on hand, or deposited in bank awaiting remittance to another state in usual course of business, had no such *situs* within the state as to be taxable there; but that where the money arises from a business transacted by an agent or fiduciary within the state by loaning it, investing it, collecting interest on it, and the like, or when it is the accumulation or income from a business done in the state, or has been permanently placed on deposit, it is taxable. The Court said concerning the instant case and *Hillman L. & C. Co. vs. Com.*, (p. 386), "In neither case did the owner by his conduct in relation to it, (money), or his manner of doing business with it, gives it what may be termed a permanent *situs* in Kentucky."

The discriminating feature in the Hillman and the Prudential cases was the temporary or transitory condition of the money.

See, also, *Com. ex. rel. vs. Ky. Dist. & W. H. Co.*, 143 Ky. 314, 136 S. W. 1032. Here it was held that the storage accruing upon whiskey in Kentucky warehouses of a New Jersey corporation, having an office in Kentucky for transaction of its Kentucky business, is taxable in Kentucky, the storage arising out of business done in Kentucky.

See, also, *In Re Enston,* 114 N. Y. 170, 181; 3 L. R. A. 464. *In Re Bronson,* 150 N. Y. 1, 34 L. R. A. 238; 55 Am. St. Rep. 632; and *Lockwood vs. U. S. Steel Corp.* 103 N. E. Rep. 697.

The *Liv. & Lon. etc.* case involved the power of a state to tax premiums on insurance due by residents to a non-resident company, which had been extended but not evidenced by written instrument, and the constitutionality of a state statute taxing them. The insurance company sued to cancel the assessment, and was defeated. The statute provided for assessing cash, open accounts, credits, etc., etc., expressing the intent that no non-resident should transact business in the state without paying a tax corresponding to that exacted of its own citizens, and the state court construed the act as designed to do away with discrimination theretofore existing against residents. The court declared (p. 353) "The indebtedness had its origin in the course of business transacted by the foreign corporation in Louisiana under the laws of that state. . . . In both cases (notes given for loans on policies and notes given for premiums) the obligations to pay would represent returns to the corporations upon business conducted within the state; . . . Nor would the power to tax depend on the presence of the notes within the state. (Citing 205 U. S. 395; 177 U. S. 133.) The notes, in these cases, (cases cited) had been removed to the creditor's home; and, despite this removal, they were attributed to the place of origin. . . . The "'checks'" in *Board of Assessors vs. Comptoir National, supra*, were only memoranda of indebtedness or vouchers." Further, the court said; (p. 354) "When it is said that intangible property, such as credits on open account, have their *situs* at the creditor's domicile, the metaphor does not aid. Being incorporeal, they

can have no actual *situs*. But they constitute property; as such they must be regarded as taxable, and the question is one of jurisdiction."

"The legal fiction, expressed in the maxim *Mobilia sequuntur personam*, yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement. *Blackstone vs. Miller*, 188 U. S. 205, 206. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the state, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power, could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there."

This decision is simply an exposition of the principle of the Kentucky case of *West India etc. Co. vs. Com.*, but the opinion in it undertakes an exposition of the principle beyond that offered in the Kentucky case. It attributes the jurisdiction to the sovereignty of the debtor's domicile, which causes another complication. If the court had said only that the permission of Louisiana to transact the business offered that government protection which served as the compensation for the power to tax, the declaration would have been satisfactory, but, when the court said "power over the debtor at his domicile is control of ordinary means of enforcement," the court seemed to justify the power to tax in any state having the right to enforce the payment of the debt; and, as such an action is transitory, it may exist in any state, and, therefore,

in divers states, affording sundry jurisdictions to tax the same property, a doctrine appearing to us highly objectionable.

To us, it seems a sound principle that the power to tax credits is in the sovereignty which protects the business out of which they accrue where such business is permanently located, and it was unnecessary to decide more in the Liv. & Lon. Co. case. The dissent of McKenna, J., in the Wheeler case, shows that power to tax was in the previous cases placed upon the principle that the *situs* depended upon transaction of business within the taxing state. The remark in *Liv. & Lon. etc. Co.* case that "power over the debtor at his domicile is control of the ordinary means of enforcement" suggests the decisions in *C. R. I. & P. Ry. vs. Sturm*, 174 U. S. 710, where jurisdiction to garnish was held to exist at the debtor's domicile, a doctrine apparently enforced in *Herbert vs. Bicknell*, 233 U. S. 70, but in the Sturm case the assertion of jurisdiction was coupled with the declaration that the jurisdiction *was asserted through necessity*, "and it cannot be evaded by the insistence upon fictions or refinements about *situs* or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors," (p. 716). The opinion in the Sturm case seems to us, therefore, to impair, if not invalidate, as to taxation, the declaration that "power over the debtor at his domicile is control of the ordinary means of enforcement." The Sturm case affirmed jurisdiction to garnish and no jurisdiction to tax, nor the existence of *situs* to tax, *per contra*, the court declared the jurisdiction to garnish irrespective of questions of *situs* to tax. The case, therefore, cannot be an authority on *situs* to tax.

Blackstone vs. Miller, 188 U. S. 205, 206, cited in the *Liv. & Lon. Co.* case, is an inheritance tax case. In that case the right of the New York authorities to impose and enforce an inheritance tax upon money in bank in New York belonging to a non-resident, domiciled at the time of his death in Illinois, notwithstanding the entire inheritance had been taxed in Illinois, was adjudicated. The gist of the decision was that New York State had the right to tax because the enforcement of the collection of a debt was dependent upon its courts. Also,

the United States supreme court recognized the right of Illinois, as well as of New York, to tax the money; saying (p. 204):

"To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicil, or that by the law of the domicil the chattel is part of a *universitas* and is taken into account again in the succession tax there," (citing authorities).

"No doubt this power on the part of two states to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same state should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law. *Coe vs. Errol,* 116 U. S. 517, 524; *Knowlton vs. Moore,* 178 U. S. 41.

"The question then is narrowed to whether a distinction is to be taken between tangible chattels and the deposit in this case. . . . If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the state of New York, then New York may subject the transfer to a tax," (citing *United States vs. Perkins,* 163 U. S. 625, 628, 629; *McCulloch vs. Maryland,* 4 Wheat. 316, 429.) "But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant." (Citing Sturm case, 174 U. S. 710, etc.) "What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay." Again, the court says, (p. 206), that the cases of tangible and intangible chattels are alike.

That the question of *situs* is a federal question is shown by the supreme courts taking jurisdiction of a writ of error to state court; see the cases cited *supra.* That the *situs* existing

in one state excludes the power of another to tax appears from the decision in the Kentucky case of the West India etc. Co.; but what becomes of the statement of the supreme court that two states may have jurisdiction to tax? We submit that this statement is ill-advised and unfounded. This appears by review of the cases cited in its support.

In *Blackstone vs. Miller,* the *ratio decidendi* was that New York had the *situs* of the deposit, because recourse to its courts for recovery was essential. No question of Illinois' right to tax was involved. It was unnecessary to pass upon the Illinois right, so comment upon it was *obiter.* It sufficed to decide that previous taxation in Illinois did not destroy New York's right, if the latter existed.

Again, for the court's assertion that "these inconsistencies infringe no rule of constitutional law," it cites *Coe vs. Errol,* and *Knowlton vs. Moore,* as said *supra,* and in *Coe vs. Errol,* the property taxed was *logs,* and all that was decided was, (p. 524) "If the owner of personal property within a state resides in another state which taxes him for that property as part of his general estate attached to his person, this action of the latter state does not in the least affect the right of the state in which the property is situated to tax it also." That this fails to sustain the assertion in *Blackstone vs. Miller* must be obvious, for the right of the state of the owner's domicile to tax the logs was not considered, but the assertion in *Coe vs. Errol* was simply that the act of the domiciliary state could not affect the right of the state of location. Undoubtedly, this would be true. The contrary would permit the domiciliary state to determine the question regardless of the rights of the state of the property's location. *Blackstone vs. Miller* is, therefore, not supported by *Coe vs. Errol* in the declaration quoted.

Indeed, exactly the reverse of the doctrine as quoted from *Blackstone vs. Miller* is established in the *U. R. Transit case,* 199 U. S. 194, for it was there held *that the state of the owner's domicile* could not tax the cars which had actual *situs* elsewhere. To cite *Coe vs. Errol,* therefore, as authority to the proposition that tangible property could be taxed both at the owner's domicile and the place of its location, is inde-

fensible in view of the principle adjudicated in the *U. R. T. case,* (199 U. S. 194).

We have, therefore, the decisions in the *U. R. Transit case* and the *West India Oil Co. case* holding exactly the reverse of the doctrine deduced from *Blackstone vs. Miller,* and the court in the latter case treated the deposit as it would have treated a tangible chattel for the purposes of the case's decision.

In *Knowlton vs. Moore,* 178 U. S. 41, 56, the duplicate taxes or taxation by two sovereignties under consideration were taxes by the state and by the United States; the question was therefore radically different from that of taxation by two different states. The federal right to tax did not show *situs* in a state different from the state which also taxed.

With great diffidence, therefore, we take issue with the statement quoted *supra* from *Blackstone vs. Miller;* and we think that two states cannot enjoy the *situs* to tax.

We find then that realty and tangible personalty are taxable where located and not otherwise, and that bonds, bills of exchange, and other securities, passing by delivery or delivery after endorsement, credits, open accounts, and bills receivable, existing without evidence in writing, and consequently unsubstantial and ideal, may be declared taxable at the domicile of the owner, or may acquire a situs at the place of their origin, when they arise out of transactions connected with a permanently located business, and in such cases as *Blackstone vs. Miller* we are informed that the same rule locates a mere debt unconnected with any business, because the debt is uncollectible without recourse to the courts of the state of the debtor's domicile. How far the rule last mentioned would be pushed if the debtor were caught and sued in several states and each claimed the right to tax upon the ground that aid of its courts had been invoked to collect the debt, *quaere.*

Assuming, however, that the debtor's domicile locates the *situs* of the debt for taxation because the courts of the state of such domicile must, or ordinarily would, be called upon to enforce the debt, it does not follow that the state of the creditor's domicile or any other state could also claim the *situs* of the debt for purposes of taxation; *sed contra,* such other states

would seem upon the authority of the *U. R. Trans. case* and *West Indian Oil case* to have no such right.

In the *U. R. Trans. case* tangible property, freight cars, were involved, and in the *West Indian Oil case* intangible property, or credits, accounts, etc., were involved, and the conclusions of the courts were the same.

Again, the opportunity and obligation of governmental protection suggests the right of taxation as to material property within the taxing territory, but the mere obligation to enforce recovery rests equally upon divers states. Nevertheless, as between the state of the debtor's domicile and that of the creditor's, it is difficult to give preference to the latter except for convenience.

Frankfort vs. Ill. Life Ins. Co., 129 Ky. 825, following *Com. vs. N. W. Mut. Life Ins. Co.,* 107 S. W. 233, and distinguishing the *Higgins* and *Dun & Co.* cases is interesting here. It was there held that securities wrongfully held by the state treasurer, owned by a life insurance company, were not taxable in Kentucky.

In this connection cases on taxation of mortgages in the state of the mortgaged property's location are pertinent. In *Frankort vs. Fidelity Trust etc. Co.,* 111 Ky. 667, 64 S. W. 470, it was held that neither the interest of non-resident bondholders nor resident trustees of deed of trust was taxable upon the value of the mortgage upon real estate in Kentucky, although the court recognized Kentucky's right to tax it, if the legislature decided to do so, saying (p. 678): "And until the legislature has by a statute given a *situs* to mortgages owned by non-residents as property within the state, there is no occasion for the courts to depart from the long-recognized rule in this state to tax mortgaged real estate to the mortgagor, and the mortgage itself, when owned and controlled by a non-resident of the state, as personal property, to be taxed, like other choses in action, at the domicile of the creditor."

The court had reviewed divers cases, including *Sav. etc. Co. vs. Multnomah Co.,* 169 U. S. 422, distinguishing it upon the ground that the Oregon statute there involved expressly taxed the mortgage interest to the mortgagee in Oregon.

A similar principle was expounded in *Com. vs. N. W. Mut. Life Ins. Co. of Wis.*, 107 S. W. Rep. 233, (32 R. 796), where a back tax collector attempted to list in Kentucky notes due from citizens of Kentucky, and secured by mortgage on Kentucky land to a foreign Insurance Company

Distinguishing previous decisions, the court said that it was not claimed that the money of the company was sent to Kentucky to be lent out, nor that the company ever had the money in Kentucky; but that it merely loaned money to Kentucky citizens, who gave notes and mortgages securing them; the papers being kept at the company's Kentucky office, "presumably for purposes of collection when due."

"That the *situs* of such personal property as choses in actions may be fixed by statute at a different place than the residence or person of its owner, is clearly sustainable. But in the absence of legislative action, the legal fiction *mobilia sequuntur personam* prevails. . . . (p. 798), Until the *situs* of such personal property is changed so as it may be legally within this state, it is not here for the purposes of taxation. The *situs* of such movable personal property as choses in action is, and, at the time of the adoption of the constitution, was identical with that of the person of the owner. It was not property ' "within this state" ' under the law, and until the law changes the *situs*, as it may do by legislative enactment, it continues to be property not within this state. Whether the legislature should make the change is a question of governmental policy," etc.

In *Sav. Soc. vs. Multnomah Co., supra*, an Oregon statute taxing in the county where the land lay, the non-resident mortgagee's interest therein was held not to conflict with the 14th amendment.

The statute (p. 424) authorized deduction from the mortgagor's assessment of the amount of the mortgage debt, and did not "provide for both taxing to the mortgagee the money secured by the mortgage, and also taxing to the mortgagor the whole mortgaged property."

Again, (p. 425) "the personal obligation of the mortgagor to the mortgagee was not taxed at all. The mortgage and the debt secured thereby are taxed, as real estate, to the mortgagee

. . . and only so far as they represent an interest in the real estate mortgaged."

It seems clear, therefore, that the interest of the mortgagee in the mortgaged land as a security for his debt is but an interest in the land, and that the state where the land lies may tax it just as it may tax any other interest in land whether fee simple, particular estate, remainder or reversion. Also, it is usual to tax the land to the mortgagor and the debt to the creditor, and at the latter's domicile, when not located elsewhere by circumstances hereinbefore discussed. The so-called change of *situs* by legislation, therefore, must not be understood to mean anything more than that the legislature may tax to a non-resident mortgagee the interest which he has by reason of his mortgage in land where it is located. Whether or not the state where the land lies may tax the debt at all, is not decided in the cases cited. Legislation, therefore, taxing the mortgagee's interest does not change the *situs* of the debt. The taxation was denied in the Kentucky cases, and, where it was recognized in the Supreme Court case, the amount, or value, of the mortgage was deducted, as is above indicated, from the amount assessed to the mortgagor. It does not, therefore, even appear what would be decided if the state where the land lies assessed the land to the mortgagor, and the mortgagee's interest therein to the mortgagee.

Akin to taxation of credits is the taxation against the shareholder of the capital stock of corporations. The principle is not identical in both cases, for the ownership of stock is essentially the ownership of the corporation's assets, although artifically assuming a different form.

The theories of the courts on taxing capital stock are conflicting. Also, the theories of some states are based upon an inconsistency, e. g., some states tax against the stockholder the value of his stock in the corporations of another state but exempt the stock in corporations of the home state. Such stock is taxed upon the assumption that it constitutes "property," and that all "property" within the state is required by the constitution to be taxed unless specifically exempted; see *Ky. St. Const.* Sec. 170. If, however, stock be "property," then it must be taxable whether in a foreign or a home cor-

poration, for the stock is as distinct from the corporation's property in one case as in the other. The taxation, therefore, of stock in a foreign corporation, while exempting the stock in a home corporation, is an unconscionable spoliation based solely upon might. The discussion by the courts of the subject is illustrated by *Com. vs. Walsh's Trustee,* 133 Ky. 103, 111; *Com. vs. Peebles,* 134 Ky. 121; *Com. vs. Lou. Gas Co.,* 135 Ky. 324; *Com. vs. Ledman,* 127 Ky. 603, 106 S. W. 247; *Sturges vs. Carter,* 114 U. S. 511.

In the *Ledman case* the Traction Co. had no property except the stock of the Railway Company, and the latter paid taxes on all its property, and it was held that the stockholder of the traction company was exempt under Ky. Stat. 4088, exempting stockholders where the corporation itself pays taxes upon its property. The decision was that, the traction company having no property independently of the railway's property, its stockholders were not assessable, all the corporate property being assessed and the taxes paid.

In the *Peebles case* it was held that stock in a foreign corporation might be taxed in Kentucky; also, that, where the stock was held by an executor of the stockholder, the *situs* for taxation was the place where the executor was appointed and not where he happened to be, nor where he kept the certificates of stock. See, also, *Com. vs. Lou. Gas Co., supra.*

In the *Walsh case* the decision was first in favor of taxing the stock in hands of the stockholder, but the decision was afterward withdrawn. The stockholder held stock in the *W. U. Tel. Co.,* which paid to Kentucky a franchise tax upon $1,000,000.00 exactly 1% of its total capital. The question was whether or not the stockholder was exempt because the corporation paid a franchise tax, Sec. 4088 providing for the exemption of stockholders where the corporation paid a tax on its franchise. The gist of the decision first made was that 1% of its property was a negligible quantity, a proposition asserted upon authority of the case of *Sturges vs. Carter, supra;* but this decision was withdrawn, and it was held that the stockholder was exempt under the statute because the corporation paid a franchise tax in Kentucky upon its property in Kentucky. It must be admitted that the decision first made

and afterward withdrawn in the Walsh case was supported by *Sturges vs. Carter,* (sec. 114 U. S. 521), but it would probably be of little value to review this old case.

A prominent instance of taxation of both the corporate property and the shares in the hands of its stockholders is the case of a national bank: *Van Allen vs. Assessors,* 3 Wall. 573, 583. The court said, "but, in addition to this view, the tax on the shares is not a tax on the capital of the bank."

In *Farrington vs. Tenn.,* 95 U. S. 679, 687, cited in Sturges case, it was expressly declared concerning a state bank, "the capital and the shares may both be taxed, and it is not double taxation."

If taxed, the shares may be taxed at the shareholder's domicile or at the corporation's domicile. Both have been done. Nevertheless, they should be given a definite *situs.* They do not exist in two different states. Convenience suggests the corporation's domicile. Also, adopting the latter insures taxing all the shares, instead of only such as can be caught. Undoubtedly, too, the taxation of the shares at the domicile of the corporation, where its own property is taxed, emphasizes the existence of double taxation, and the propriety of discontinuing the taxation of shares.

Inheritance Taxes

Inheritance taxes stand upon a different footing from property taxes. They are levied not upon ownership of property, but upon its succession.

"Taxes of this general character are universally deemed to relate not to property, *co nomine,* but to its passage by will or by descent in cases of intestacy as distinguished from taxes imposed upon property, real or personal as such, because of its ownership and position." *Knowlton vs. Moore,* 178 U. S. 41, 47.

The theory of inheritance taxation is that it is not fettered by the constitutional limitations imposed upon the taxation of the property of an individual, but that the state has absolute dominion over the property of a decedent and over its devolution, and may impose such tax as it may please before

permitting the decedent's property to pass to living persons, and may designate the persons to take.

Whether or not the doctrine be sound upon which inheritance taxes are imposed unlimited by the constitutional restrictions upon general taxation, *quaere*. *Black vs. State*, 113 Wis. 205, 216, 218, 224, 228; 89 N. W. Rep. 526; *Nunnemacher vs. State*, 129 Wis. 190; 108 N. W. Rep. 62 718. It is not clear that because a state may regulate the devolution of a decedent's property it may confiscate it. Such regulation is a governmental necessity, and is based upon a principle akin to the police power. The right to regulate is certainly not the right to confiscate.

Assuming, however, that the right to tax inheritances be virtually unlimited, such right seems properly confined to the state having the authority to direct the devolution of title, for it is such state that possesses the omnipotence which is the basis of the right to tax. We have seen, though, from *Blackstone vs. Miller* that the right to tax is recognized as existing in other states as well, although such other states look to the state directing the devolution for the terms of devolution. The adjudication of the existence in such other states of the right to tax also seems to stand upon some theory of *situs*, or actual presence of the property in the latter states, but there appears no basis for such theory for only one state can possess the power of devolution upon which the right to tax inheritances is based. Clearly, therefore, we think, legislation ought to limit the right of taxation, and limit it to the state of devolution of title, and not permit any state which may have no right to tax, except that it has the opportunity to exercise its might irrespective of right, to impose an inheritance tax. Nor should the necessity of resort to the laws of another state to recover property there constitute the basis of a right in such state to tax an inheritance. Such right of resort to courts is a right generally accorded by states through comity to citizens of other states, and such right is generally reciprocated, and is not in other instances regarded as any basis for taxation nor as establishing a *situs* for taxation, even if *situs* in any sense were applicable to inheritance taxes. It ought not, therefore,

to be held that more than one state had the right to tax inheritances.

The devolution of property must be, and is, controlled by a single state. Generally personal property devolves according to the law of the owner's domicile, but real property according to that of its location. If, therefore, the state's right to tax inheritances, or the transmission of inheritances, depends upon its right to direct the devolution of the property, only one state can have such right to tax. If the state of land's locality has the right to direct its devolution, such state may tax, and no other state has or should have the right to tax. Likewise, if the devolution of personal property be according to the law of the state of the domicile, such state only should have the right to tax. It seems inconceivable that two states should have the right to tax personalty, and only one the right to tax realty. The whole domain of controversy seems, therefore, to hinge upon the question of *situs* and property, like a person, can have but one *situs*.

Of course, taxation by a state is no bar to federal taxation, both governments having concurrent, and neither having exclusive, dominion or jurisdiction.

Railroad Rolling Stock

The taxation of railway rolling stock is now pretty well settled, and probably correctly so settled. Such movables roam over the United States, and the only practicable way to reach them is to apportion them according to some unit, such as mileage. Such apportionment is upheld upon the theory that the proportion determined is actually in the particular state levying the tax, thereby instituting a computation by approximation.

Rolling stock, although not stationary in any place, is, nevertheless, not taxable at the owner's domicile, when it never reaches such domicile, but is permanently absent therefrom. *Union R. T. Co. vs. Ky.*, 199 U. S. 194.

Where such rolling stock is owned by a railroad company, it is treated as part of the plant composed of the railroad to which it is attached and its rolling stock. Where such railroad extends through more than one state it becomes necessary

to apportion it among the states, and, inasmuch as it is impracticable to locate any part of the rolling stock in any of the states, the apportionment is made according to approximation, more or less arbitrary, and based upon mileage of the railroad in a state

Fargo vs. Hart, 193 U. S. 490, 496, 500; *Union T. Co. vs. Ky.,* 199 U. S. 194, 206; *State Railroad Tax Cases,* 92 U. S. 575, 698; *Pullman etc. vs. Penn.,* 141, U. S. 18; *Pitts, etc. Ry. vs. Backus,* 154 U. S. 421, 430; *Adams Exp. Co. vs. Ohio,* 165 U. S. 194; 166 U. S. 185; *Am. Ref. T. Co. vs. Hall,* 174 U. S. 70, 78; etc.

This approximation, although somewhat actually arbitrary, is, nevertheless, theoretically based upon the presumption that the rolling stock is actually located in each state in proportion to the mileage of its owner in such state. Rolling stock in one state is, therefore, theoretically, not taxed in another; cases cited, *supra, sed. vide, N. Y. C. R. R. Co. vs. Miller,* 202 U. S. 584.

Cases cited *supra.*

Where the owner has no railroad, to which the rolling stock can attach and compose together with it a plant as a unit, other methods of taxing it are adopted. *Am. Ref. Co. vs. Hall,* 174 U. S. 70; *Union etc. Co. vs. Lynch,* 177 U. S. 149,

Taxation of Ships

The taxation of ships has been comparatively recently elaborately discussed in *Old Dom. S. S. Co. vs. Virginia,* 198 U. S. 299; *Ayer & Lord Tie Co. vs. Kentucky,* 202 U. S. 409, and *Sou. Pac. Co. vs. Kentucky,* 222 U. S. 63.

The gist of the decisions in these cases was that the vessels were taxable in the state of the domicile of the owner, except where they had acquired a permanent *situs* in some other state by reason of their permanent, or continual use there. In the *Old Dominion case,* the vessels had acquired such a *situs* wholly within a state, but in the other two cases they had not. These decisions are really based upon the same principle as *Union R. T. Co. vs. Ky.,* because they distinguish between the nature of railroad rolling stock and that of vessels, the former being confined to well defined lines of rails, while the latter

roam all over the seas without definite course, and making port only as an incident to the voyage. The principle, may, therefore, be said to be established that vessels take the *situs* of the domicile of the owner with the exception just noted.

Again, the principle thus expounded is really in accord with that generally based upon the fiction *mobilia sequuntur personam,* because the *situs* thus acquired by relation to the owner's domicile is established through necessity, there being no permanent location of the vessels elsewhere so as to obtain another *situs.*

It thus appears that although *situs* generally involves a question of constitutional, or private international law, nevertheless there is room for valuable work through legislation in the solution of the vexed questions which now perplex the courts, grievously disturb business, and often work wicked injustice.

EDMUND F. TRABUE.

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